No. 3112

In The United States
Circuit Court of Appeals
FOR THE NINTH JUDICIAL CIRCUIT

THE CITY OF SEATTLE, a Municipal Corporation,

Plaintiff in Error,

vs.

LLOYD'S PLATE GLASS INSURANCE COMPANY, a Corporation,

Defendant in Error.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HON. E. E. CUSHMAN, *Presiding.*

Brief of Plaintiff in Error.

HUGH M. CALDWELL,
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BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is an action brought by the Lloyd's Plate Glass Insurance Company, a corporation, to recover from the City of Seattle, in the nature of damages, certain moneys paid by the Lloyd's Plate Glass Insurance Company and the Globe Indemnity Company on policies of insurance covering the plate glass owned by divers and sundry citizens of the State of Washington, for damages to their respect-

ive property for loss of glass claimed to have been suffered by reason of the explosion of 80 per cent and 90 per cent nitro-glycerin content gelatin anchored in the harbor of Seattle awaiting a vessel to carry it to its destination, it having been shipped by the Hercules Powder Company of San Francisco, California, to the Baldwin Shipping Company at Vladivostok, Asiatic Russia, transfer at Seattle.

The City of Seattle by Ordinance No. 34379, created a fairway, subject to anchorage, consisting of all of Elliott Bay lying easterly of a straight line drawn from Alki Point to West Point. Within these waters it created a district known and designated as Elliott Bay anchorage. Within Elliott Bay anchorage the city constructed and maintained an anchorage buoy known as "Buoy No. 1." This buoy is located a half mile from the path of shipping that comes into Seattle harbor, a half mile from the wharves, docks and railways and thirteen hundred (1300) feet from a fill in Elliott Bay, known as Harbor Island, Harbor Island at the time of the explosion in question being vacant and unoccupied land. The Hercules Powder Company of San Francisco, California, shipped to the Baldwin Shipping Company at Vladivostok, via Seattle, fifteen (15) tons of 80 per cent and 90 per cent nitro-glycerin content gelatin on the "S. S. Loop," a steamer engaged in coastwise trade only. From Seattle this nitro-glycerin was to be transported to its destination on one of the Japanese Marus sailing about the time the "Loop" arrived. This

steamship could not take it, however, and it was arranged to ship it on the "S. S. Robert Dollar," a steamer sailing about a week after the Maru which was to have taken it, had sailed. It was necessary, therefore, to unload it from the "Loop" onto a scow to await the arrival of the "Robert Dollar." This scow was chartered by the Lillico Launch & Towboat Company, which was the agent of and acting for, the Hercules Powder Company, the owners of the nitro-glycerin. Without the knowledge of the port warden this scow was, on the 14th day of May, 1915, anchored to said Buoy No. 1 by the Lillico Launch & Towboat Company to await the arrival of the steamship "Robert Dollar," which was the next vessel carrying explosives bound for Vladivostok. On the night before the "Robert Dollar" was to take aboard this nitro-glycerin it was exploded by some agency unknown to anyone, but presumably by an explosive bullet fired into it or by a time bomb placed on the scow by German agents. Because of the delay in the trans-shipment of this nitro-glycerin the scow containing it was anchored at said buoy from the night of the 14th of May until the morning of the 30th of May. The result of the explosion of this dynamite was the breakage of considerable plate glass in the City of Seattle owned by divers and sundry persons, citizens and residents of the City of Seattle, as more fully appears from Exhibits "B" and "C." The Lloyd's Plate Glass Insurance Company and the Globe Indemnity Company had issued policies of

insurance to these various persons insuring them against loss on plate glass. Under these policies the companies replaced the glass and filed claims against the City of Seattle for the amounts paid for the replacing of glass under their respective policies. The persons who actually suffered the damage to their property by reason of the explosion never filed any claims against the City of Seattle as required by law, or at all, nor was there any authority granted by said persons, or any or either of them, to the Lloyd's Plate Glass Insurance Company, or to the Globe Indemnity Company, or their, or either of their agents or servants, to file any claim for them, or on their behalf, against the City of Seattle. The Globe Indemnity Company assigned its pretended claim to the Lloyd's Plate Glass Insurance Company and this latter company commenced suit against the City of Seattle to recover what they had both paid out by virtue of their several policies, charging the city with liability by reason of the negligence of its port warden, and, with the creation of a niusance permitting nitroglycerin in foreign commerce to be anchored at Buoy No. 1 in the harbor of Seattle.

The question of negligence was waived by the failure to introduce any testimony showing acts of negligence and the case rested upon the question of nuisance. It was clearly shown by the testimony that Buoy No. 1 was a safe and proper place for the anchorage of vessels carrying as cargo, or part cargo, explosives of the kind contained on the

scow anchored at said buoy, and that the Harrison Street Powder Dock, a place appointed by the city for the handling of powder locally, was not a safe place for the storage of such explosives, and that had this amount of nitro-glycerin exploded at the latter dock the opportunity for loss of life would have been very great. The testimony, we believe, without dispute shows that from the time of the establishment of the Harrison Street pier as a powder dock there had never passed over or through, nor had there ever been stored on, said dock any explosive in any form in foreign commerce; that nothing but powder and explosives for transportation or use inland had ever been stored or unloaded at said Harrison Street pier; that all vessels engaged in interstate and foreign commerce arriving in the harbor of Seattle carrying explosives for transhipment by water, were all anchored, and the explosives transferred, either at Buoy No. 1 or at some other place on the water within Elliott Boy. The Court in ruling upon the case as submitted agreed that Buoy No. 1 was a safe place for the handling of explosives in commerce, but held that the port warden of the City of Seattle by permitting this scow of nitro-glycerin destined for Vladivostok to anchor at Buoy No. 1 instead of requiring the same to tie up to the Harrison Street dock, violated the terms of Ordinance No. 34379 and thereby created a nuisance for which the city was liable. The City of Seattle took due exception and brings the case to this court for review.

SPECIFICATIONS OF ERROR.

1. The court committed error in overruling the City of Seattle's demurrer to the amended complaint.

2. The court committed error in receiving in evidence the claim of the Lloyd's Plate Glass Insurance Company, Exhibit B, and the claim of the Globe Indemnity Insurance Company, Exhibit C, and in holding that the claims and each of them were sufficient in law.

3. The court erred in holding, as a matter of law, that the port warden of the City of Seattle created a nuisance, for which the City of Seattle was responsible, by permitting a vessel with a cargo of nitro-glycerin in transit from the Port of San Francisco, in the United States, to the Port of Vladivostok, in Asiatic Russia, to be anchored at Buoy No. 1, established in Seattle harbor in aid of commerce.

4. The court erred in holding, as a matter of law, the City of Seattle liable for the act of its officer, the port warden, while engaged purely in a governmental function.

5. The court erred in holding, as a matter of law, the City of Seattle liable for the results of an explosion of nitro-glycerin anchored in Seattle harbor and over which nitro-glycerin the city could not and did not exercise any control or jurisdiction, it being in transit in foreign commerce.

6. The court erred in denying plaintiff's motion to dismiss urged at the close of plaintiff's testi-

mony, renewed and again urged at the close of all the testimony.

7. The court erred in entering judgment in favor of Lloyd's Plate Glass Insurance Company and against the City of Seattle.

ARGUMENT.

THE COURT ERRED IN OVERRULING THE DEMURRER OF THE PLAINTIFF IN ERROR TO THE AMENDED COMPLAINT OF THE DEFENDANT IN ERROR.

We do not enter upon an extended discussion of this point at this place because, the arguments advanced on the other errors assigned are applicable to this error, and we ask the court to consider them as having been addressed to this point.

II.

THE COURT COMMITTED ERROR IN RECEIVING IN EVIDENCE THE CLAIM OF THE LLOYD'S PLATE GLASS INSURANCE COMPANY "EXHIBIT B," AND THE CLAIM OF THE GLOBE INDEMNITY INSURANCE COMPANY, "EXHIBIT C," AND IN HOLDING THAT THE CLAIMS AND EACH OF THEM WERE SUFFICIENT IN LAW.

Before an action can be commenced against the City of Seattle for damages sounding in tort, a claim must be presented to the City Council and filed with the city clerk, as provided by Sec. 29 of Article IV of the Charter of the City of Seattle:

"Sec. 29. CLAIMS FOR DAMAGES,

WHEN AND HOW PRESENTED: All claims for damages against the city must be presented to the city council and filed with the clerk within thirty days after the time when such claim for damages accrued, and no ordinance shall be passed allowing any such claim or any part thereof, or appropriating money or other property to pay or satisfy the same or any part thereof, until such claim has first been referred to the proper department, nor until such department has made its report to the city council thereon, pursuant to such reference. All such claims for damages must accurately locate and describe the defect that caused the injury, accurately describe the injury, give the residence for one year last past of claimant, contain the items of damages claimed, and be sworn to by the claimant. No action shall be maintained against the city for any claim for damages until the same has been presented to the city council and sixty days have elapsed after such presentation."

as reinforced by Sections 7995, 7996 and 7997 of Rem. & Bal. Code of the State of Washington, as follows:

"§ 7995. FIRST CLASS CITIES — CLAIM MUST STATE RESIDENCE. Whenever a claim for damages sounding in tort against any city of the first class shall be presented to and filed with the city clerk or other

proper officer of such city, in compliance with valid charter provisions of such city, such claim must contain, in addition to the valid requirements of such city charter relating thereto, a statement of the actual residence of such claimant, by street and number, at the date of presenting and filing such claim; and also a statement of the actual residence of such claimant for six months immediately prior to the time such claim for damages accrued."

"§ 7996. CUMULATIVE WITH CHARTER PROVISIONS. Nothing in this act shall be construed as in any wise modifying, limiting or repealing any valid provision of the charter of any such city relating to such claims for damages, but the provisions of this act shall be in addition to such charter provision, and such claim for damages, in all other respects, shall conform to and comply with such charter provisions."

"§ 7997. PROVISIONS MANDATORY. Compliance with the provisions of this act is hereby declared to be mandatory upon all such claimants presenting and filing any such claims for damages."

None of the parties whose property was actually damaged filed claims with the City of Seattle, nor did any of them authorize either the Lloyd's Plate Glass Insurance Company or the Globe Indemnity Insurance Company to file a claim for them, but the Lloyd's Plate Glass Insurance Com-

pany and the Globe Indemnity Insurance Company on their own motion filed claims against the city for the loss they paid on the policies of insurance held by the individuals in said companies. All the policies were identical and contained the following clause:

> "4. The company shall be subrogated to all rights which the assured may have against any person, partnership, corporation, or estate, as respects any payment made under this policy, *and the assured shall execute all papers required to secure to the company such right.*" Record, p. 100.

We contend that under the charter and the laws of the State of Washington the person actually suffering the damage to his property can alone file a claim against the city for such damage. Neither the Lloyd's Plate Glass Insurance Company nor the Globe Indemnity Insurance Company suffered any damage to its property. They simply compensated the individual claiming to have suffered damage for his loss because, forsooth, the individual was insured against loss in one or the other of said companies. Record, pp. 39, 89. The Supreme Court of the State of Washington in construing the law relative to claims against municipal corporations has held uniformly that one of the purposes of requiring a claim to be filed was to give the city authorities an opportunity not only to investigate the claim *but also to investigate the claimant.*

Cole v. Seattle, 64 Wash. 1.

Collins v. Spokane, 64 Wash. 153.

The real claimant, in the purview of the charter and laws of the State of Washington, is the person who actually suffers the damage to his property or person.

Haynes v. Seattle, 83 Wash. p. 51, is a case where the daughter suffered injuries on account of the negligence of the city. Her father filed a claim against the city. The Supreme Court of Washington, in construing the right of a third person to file a claim for the injured person, said:

> "The statute establishes the public policy of the state, and the same dignity must be accorded to charter provisions with a like period of limitation in cities of the first class. * * * The claim presented by the father did not comply with the provisions of the city charter because it was not 'sworn to by the claimant.' In *Cole v. Seattle* we held that this clause was reasonable and that it was 'an earnest of that good faith which the city has a right to demand.' "

This case, we think, is on all fours with the case at bar, the claims in issue here, like the claims in the Haynes case, were not sworn to, nor filed, by the real claimants. The insurance companies had the right under the clause of their policies, above quoted, to require all those persons suffering injury to their property to file a claim against the city. In fact, this is the only right the insur-

ance companies had. That provision was incorporated in their policy to cover just such contingencies as arose here. The companies having failed to make that requirement but assuming to file a calim for themselves only, not even purporting to be on behalf of the persons actually injured, cannot maintain this action. The claims were wrongfully admitted in evidence and wrongfully held to be sufficient in law.

III.

THE COURT ERRED IN HOLDING AS A MATTER OF LAW THAT THE PORT WARDEN OF THE CITY OF SEATTLE CREATED A NUISANCE, FOR WHICH THE CITY OF SEATTLE WAS RESPONSIBLE, BY PERMITTING A VESSEL WITH A CARGO OF NITRO-GLYCERIN IN TRANSIT, FROM THE PORT OF SAN FRANCISCO, IN THE UNITED STATES, TO THE PORT OF VLADIVOSTOK, IN ASIATIC RUSSIA, TO BE ANCHORED AT BUOY NO. 1, ESTABLISHED IN SEATTLE HARBOR, IN AID OF COMMERCE.

Constitution, State of Washington, Art. XI, paragraph 11, provides:

> "Any county, city, town, or township, may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws."

Sec. 7507, Rem. & Bal. Code of Washington, paragraph 27, provides:

"Any such city (as the City of Seattle) shall have power—

"27. To control, regulate, or prohibit the anchorage, moorage, and landing of all water crafts and their cargoes within the jurisdiction of the corporation."

Article IV, Sec. 18, paragraph 27th, Seattle City Charter, provides:

"The city council shall have power by ordinance and not otherwise—

"Twenty-seventh. REGULATION OF WATER CRAFT: To control, regulate and prohibit the anchorage, moorage and landing of all water craft and their cargoes within the jurisdiction of the corporation."

By virtue of this faundamental authority the city council of the City of Seattle passed Ordinance No. 34379. Section 1 provides:

"Section 1. The City of Seattle in the exercise of its police power hereby assumes control and jurisdiction over all navigable waters within the City of Seattle over which the city has control and jurisdiction, and such waters shall, for the purpose of this ordinance, be known as 'Seattle Harbor.' "

Record, p. 50.

Section 2 defines vessel as follows:

"Section 2. The word 'vessel' shall include ships, boats, steamers, *scows*, *barges* and other structures adapted to navigation or move-

ment from place to place by water."

Record, p. 50.

Section 4 of this ordinance provides that the master of every vessel entering the harbor between 8:00 A. M. and 5:00 P. M. except vessels carrying cargoes, or part cargoes of explosives, and coastwise vessels, shall report to the port warden. Record p. 50.

Section 7, after describing and naming the "fairways," provides:

> "It shall be unlawful for the master, or other person in charge of any vessel, to anchor, tie or make fast such vessel in any such fairway for a longer period of time than reasonably sufficient to load or unload the same, *except that the port warden may, in his discretion, grant any permit for the use of any such fairway for a longer period of time whenever in his judgment such use will not interfere with the use of the fairway by any other vessel, but only upon the payment of the anchorage charges herein provided for.*"
>
> Record p. 51.

Section 8 defines the district known as Elliott Bay anchorage and within which Buoy No. 1 is located. Record p. 52.

Section 9 provides for fees for anchorage of vessels to city buoys. Record p. 52.

Section 19 provides:

> "It shall be unlawful for any person to *handle or store on any pier*, other than a *pier*

specially designated for such purposes, any explosive * * * whose contents would be liable to cause danger * * *."

Record p. 53.

Section 33 provides no master or other person in charge of any vessel shall attach the same to a city buoy until permission from the port warden has been obtained. Provided, if a vessel be attached to such buoy in the night the person in charge shall notify the port warden at 8:00 o'clock A. M. the next day "the name and character of such vessel, and *the probable length of time it is desired to remain at said buoy.* Should more than one vessel or obstruction apply for the use of any particular buoy, the port warden shall be the sole judge as to which shall occupy the same, and his decision shall be final and conclusive." Record p. 54.

Paragraph 3 of Section 38 provides:

"Every vessel lying *at any powder dock* or *at anchor within Seattle harbor*, which has a cargo, or part cargo, of dynamite, ignition caps, blasting or sporting powder, or other high explosive or explosives, in any form" shall display certain signals as provided in International Code Flag "B." Record p. 55.

Paragraph 4 of Section 38 provides:

"No person shall on any pier, or other structure, except on the powder dock or *on powder boats*, within Seattle Harbor, store or have on hand for sale, or sell, or keep any

powder, ignition caps, dynamite or other like explosive, either by day or night."

Record p. 55.

Paragraph 11 of Section 38 provides:

"Every vessel carrying a cargo of explosives in any form, while lying at anchor or *at a city buoy*, or alongside the powder dock, shall at all times, both by day and night, have on board a competent and sufficient crew, which shall at all times display the required signals and be ready to and have authority to immediately move such vessel when emergency requires, or when required by the port warden."

Record p. 57.

Paragraph 16 of Section 38 provides:

"When, *in the judgment of the port warden*, any person to whom any permit has been issued under the provisions of this ordinance for the handling of explosives, shall have violated any of the terms of such permit, it shall be his duty to revoke said permit forthwith."

Record p. 58.

Section 39 of said ordinance provides:

"The Harrison Street municipal pier is hereby designated for use temporarily as a powder dock, and for use exclusively for the handling of powder, dynamite and other like explosives, *and as a place* for vessels carrying as cargo, or part cargo, such explosives."

Record p. 58.

From the provisions of Sec. 11 of Art. XI of the constitution of the State of Washington it unequivocally appears that the City of Seattle in the exercise of its police power has authority to make and enforce within its limits such local, *police* and sanitary regulations as are not in conflict with the general laws. It likewise appears that, in addition to this power, the legislature has granted to the city the right to control, regulate or prohibit the anchorage, moorage and landing of all water craft and their cargoes within its jurisdiction. This authority given by the constitution and the legislature was accepted by the people of the city and adopted as part of such charter, in the exact language of the enactment of the legislature. To carry into effect these powers granted to, and accepted by, the city, the charter of Seattle, Article XII, provides for a harbor department. Section 3 of Article XII of the charter provides for the regulation of wharves and wharfage, and is as follows:

> "Sec. 3. REGULATION OF WHARVES AND WHARFAGE: The city council shall, by ordinance, regulate the tolls for wharfage, dockage and other charges at all wharves, slips, docks and landing places within the city, and provide for the regulation of berths and landing of all steamers, sail vessels, barges or other water craft, and shall exercise in regard to all such wharves, slips, docks and landing places such other control not herein specified as shall not be inconsistent with the laws

of the United States and of the State of Washington." Record p. 64.

Section 5 provides for the appointment of a port warden, and is as follows:

> "Sec. 5. PORT WARDEN: The mayor, by and with the advice and consent of the city council, shall appoint a port warden, who shall perform such duties not inconsistent with this charter, in relation to harbors and wharves, as may be prescribed by ordinance, and who shall be deemed the head of the harbor department." Record p. 64.

By virtue of and in consonance with, these constitutional, statutory and charter, powers of the city council, the legislative body of the City of Seattle, passed Ordinance No. 34379. By Section 1 of this ordinance the City of Seattle expressly announces its intention to exercise its *police power* over the navigable waters within the City of Seattle, known as Seattle Harbor. Section 2 defines "vessel" to include "scows" and "barges." Section 7 provides "that the port warden may, *in his discretion, grant any permit for the use of any fairway for a longer period of time whenever in his judgment such use will not interfere with the use of the fairway by any other vessel.*"

We pause here to suggest to the court, that the place where, and the length of time that, any vessel carrying a cargo of recognized articles of commerce, may lie at anchor, or be moored in Elliott Bay, is placed wholly within the discretion of the port war-

den. It is well known, and this court will take judicial knowledge of the fact, that nitro-glycerin, 80 and 90 per cent gelatine content, otherwise known as gelatine dynamite, is a recognized article of commerce. It is likewise known that it becomes part of the cargo of vessels. The constitution makers, the legislature, the people of Seattle, and the legislative body of said city fully knew this fact when they gave to the port warden the discretion relative to the place where, and the length of time that, such vessels should be permitted to lie at anchor in the harbor of Seattle. Therefore, when the port warden of the City of Seattle granted a permit to the Lillico Launch & Towboat Company to anchor the vessel loaded with nitro-glycerin, in transit to Vladivostok, Russia, at Buoy No. 1 for the length of time it was anchored there, he exercised the discretion granted to him by the legislative authority of the city. This is emphasized by Section 33 of Ordinance No. 34379 which requires the master of a vessel attaching it to any buoy to notify the port warden the *probable length of time* he desires to remain at such buoy, and makes the port warden the sole judge as to which vessel, when more than one applies, shall occupy any particular buoy and makes his decision "final and conclusive." Record, p. 54. No where in this record is it shown or claimed that the anchoring of this scow (vessel) at Buoy No. 1 interfered with "the use of the fairway by any other vessel." It cannot be, nor is it, contended that the port warden abused the discre-

tion with which he was clothed. It is so well settled, both by precedent and authority, that where a discretion in the performance of an act or duty is vested in a public official, that public official, or the entity of which he is an official, will not be liable for the results of the exercise of that discretion, where the same is fairly and honestly exercised, as the record shows it to have been in this case. We deem it unnecessary to cite to this court cases to sustain this principle. The city council of the City of Seattle recognized the necessity of reposing in the officer empowered by the charter with the enforcement of ordinances regulating the anchorage and moorage of vessels in the harbor, a wide discretion; it also knew and recognized, as everyone else did, that in a port like the Port of Seattle there would arrive in its harbor vessels carrying explosives, both for foreign shipment and local consumption. It also knew that it would be necessary to anchor, moor or tie such vessels to the buoys provided by the City of Seattle, as an aid to commerce, for varying periods of time. It further knew that explosives in quantities could be shipped only on those vessels engaged in that particular business. It likewise knew that it could not prohibit or interfere with the shipment of explosives either in inter-state or foreign commerce. It further knew that vessels sailing coastwise, carrying explosives to be re-shipped to a foreign port, would enter Seattle harbor, and varying periods of time must elapse between the arrival of the coast-

wise vessel and the sailing of the vessel foreign. With this knowledge, aided by the experience of the port warden, it reposed in the port warden a discretion to permit any vessel carrying explosives as cargo or part cargo to lie at anchor or be moored to any buoy in Seattle harbor for such period of time as shipping conditions might warrant. Throughout Ordinance No. 34379 the right of vessels either to lie at powder docks, to be moored to buoys, or to ride at anchor in Seattle harbor, is recognized and permitted. Thus in section 33 it is said:

> "Provided, that during the night or in bad weather such vessel or obstruction may be attached to any vacant city buoy, but the master, owner or person in charge thereof shall notify the port warden not later than eight (8) o'clock, a. m. of the next legal day of such act, stating the name and character of such vessel or obstruction and the *probable length of time* it is desired to remain at said buoy. Should more than one vessel or obstruction apply for the use of any particular buoy, the port warden shall be the sole judge as to which shall occupy the same, and his decision shall be final and conclusive."
>
> Record p. 54.

And in paragraph 3 of Section 38:

> "Every vessel lying at any powder dock *or at anchor within Seattle Harbor, which has a cargo, or part cargo, of dynamite,* * * *

or other explosive or explosives in any form."

Record p. 55.

And again in paragraph 4 of Section 38:

"No person shall on any pier, or other structure, *except* on the powder dock or *on powder boats, within Seattle Harbor, store* * * * or *keep* any powder, ignition caps, *dynamite or other like explosive,* * * *."

Record p. 55.

Again in paragraph 11 of Section 38:

"Every vessel carrying a cargo of explosives in any form, while lying at anchor or at a *city buoy* or alongside the powder dock * * *." Record p. 57.

And again in paragraph 6 of said section:

"*When in the judgment of the port warden* any persons to whom any permit has been issued under the provisions of this ordinance for the handling of explosives shall have violated any of the terms of such permit it shall be his duty to revoke said permit forthwith."

Record p. 58.

These provisions not only recognize the right of vessels (which include *scows* and *barges*) having as cargo or part cargo explosives in any form, to anchor or to tie up to the buoys in Seattle harbor, as long as in the judgment of the port warden they do not interfere with any other vessel, but expressly grant such right.

It is argued by defendant in error that Section 39 not only denies any discretion to the port war-

den, but in terms prohibits the port warden from permitting any vessel entering Seattle harbor carrying explosives in any form, to lie, or be, at any other place therein, except at the Harrison Street municipal pier, which is temporarily appointed as a powder dock. The language of that section is:

> "The Harrison Street Municipal Pier is hereby designated for use temporarily as a powder dock, and for use exclusively for the handling of powder, dynamite and other like explosives, and as a place for vessels carrying as cargo or part cargo such explosives."
>
> Record p. 58.

It is contended that the word "exclusively" as used in this section applies to the anchoring and tieing up of vessels. It is a fundamental rule of construction that, first, the intent of the legislative body shall control; second, that an ordinance or statute shall be so construed as to give effect to all of its provisions; third; that words must be given their ordinary and usual meaning; and fourth, that nothing should be added or eliminated unless necessary to give sense to that which remains. Applying these rules to the construction of this ordinance such contention cannot be maintained. The word "exclusively" as used in Section 39, is used in conjunction with and as limiting the kind of freight, to be handled on the Harrison Street municipal pier, to powder, dynamite and other like explosives, not as limiting the place or places where vessels carrying such explosives as cargo or part

cargo should be moored, anchored or tied; for in paragraph 11 of Section 38 it is said:

> "Every vessel carrying a cargo of explosives in any form while lying *at anchor* or *at a city buoy* or alongside the powder dock shall at all times, etc." Record p. 57.

If it was the intention of the law-makers that the word "exclusively" should be applied to the powder dock, as a place for vessels carrying cargo or part cargo of explosives, to lie, why did they in express language in the preceding section recognize the right of a vessel to lie "at anchor or at a city buoy" as well as at the powder dock? That the word "exclusively" was intended to apply to the kind of freight handled at the Harrison Street municipal pier is reinforced when we consider the usual meaning attributed to the word "handling." Webster defines "handling" as "manipulation, a touching or using with the hand." Hence, the phrase "for handling of powder, dynamite and other like explosives" means that nothing but dynamite, powder and like explosives shall be there handled, to the exclusion of all other kinds of merchandise or freight. Taking this ordinance as a whole the clear intention of the lawmakers was that Section 39 should read:

> The Harrison Street municipal pier is hereby designated temporarily as a powder dock to be used exclusively for the handling of powder, dynamite and other like explosives and *also* as one of the places in Seattle Harbor

for vessels carrying as cargo or part cargo such explosives.

This construction gives effect to all of the provisions of the ordinance and permits them all to be effective. It is the construction placed upon the ordinance by those charged with the duty of its execution.

The construction of this ordinance by the department charged with its enforcement, while not controlling on the courts, is entitled to great respect.

In *Edwards v. Darby*, 12 Wheat. 206, 6 L. Ed. 603, the Supreme Court of the United States said:

> "In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect."

In *United States v. MacDaniel*, 7 Pet. 1, 8 L. Ed. 587, at page 592, the court says:

> "A practical knowledge of the action of any one of the great departments of the government must convince every person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow that he must show a statutory provision for everything he does. No government could be administered on such

principles. To attempt to regulate by law the minute movements of every part of the complicated machinery of government would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers, there are numberless things which must be done that can neither be anticipated nor defined, and which are essential to the proper action of the government. Hence, of necessity, usages have been established in every department of the government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits. And no change of such usages can have a retrospective effect, but must be limited to the future.

"Usage cannot alter the law, but it is evidence of the construction given to it, and must be considered binding on past transactions."

In *United States v. Moore*, 95 U. S. 763, 24 L. Ed. 588, at page 589, the court says:

"The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. The officers concerned are usually able men, and masters of the subject. Not unfrequently they are the draftsmen of

the laws they are afterwards called upon to interpret."

In *Brown v. United States*, 113 U. S. 568, 28 L. Ed., 1079, at page 1080, the court said:

> "These authorities justify us in adhering to the construction of the law under consideration, adopted by the executive department of the government."

This court recognized and adopted this rule in *Baker v. Swigert*, 199 Fed. 865, at 867. So has the Supreme Court of Washington in *Reagan v. School Dist.*, 44 Wash. 523.

If the construction of this section as contended for by defendant in error was permitted it would act as a repeal of all the provisions of the ordinance relative to the discretion vested in the port warden and the continued recognized right of vessels, carrying cargoes of explosives in any form, to anchor anywhere the port warden may permit them in the harbor, as well as all of the provisions of said ordinance permitting the transfer of explosives from one vessel to another in Seattle Harbor. Were it the intention of the legislative body to limit the place in the harbor, where vessels, carrying as cargo or part cargo explosives, should lie, to the Harrison Street municipal pier, how easy it would have been for them to have used words indicating such an intention rather than the words "*and as a place* for vessels carrying as cargo or part cargo such explosives," and the words in Section 38—

> "Every vessel carrying a cargo of explosives in any form, while lying at anchor or at a

city buoy, or alongside the powder dock,"

and the words,

> "Every vessel engaged in the transfer of any explosive from one vessel to another within Seattle Harbor shall, etc.,"

and the words,

> "Every vessel whether lying at anchor or at a city buoy or in any other position within Seattle Harbor, engaged in the transfer of explosives, etc."

That the legislative body intended the powder dock to be but one of several places where vessels might anchor or tie up is made more impressive by the language used in pargraph 11 of Section 38, where it is said:

> "Every vessel carrying a cargo of explosives in any form while lying at anchor or at a city buoy or alongside the powder dock shall at all times, etc."

Here is an express recognition of three lawful places where vessels carrying explosives in any form may come to rest in Seattle Harbor. Why, if the legislative body intended the word "exclusively" in Section 39 to apply to the place of tying up of vessels, did it designate the three places in Section 38? The designation of these three places is conclusive to our mind that it intended the powder dock to be but one place where vessels might tie up and come to rest. As one of the reasons for the construction of this ordinance, as contended for by defendant in error, the court intimated, that because the word

"dynamite" was used in Section 39, and the words "explosives in any form" were used in paragraph 11 of Section 38, that a ship carrying dynamite could only anchor at the powder dock. (Record p. 86.) With all due respect to the learning and ability of the *nisi* court this construction is too strained for adoption. The words "explosives in any form" contained in paragraph 11 of Section 38 mean explosives in *all and every form.*

It is said by the Supreme Court of the United States in the case of *Chicot County v. Lewis*, 103 U. S. 164, 26 L. Ed. 495, in construing an Act of the General Assembly of the State of Arkansas which provided "That *any county* in this State may subscribe to the stock of *any railroad* in this State, now chartered or incorporated or which shall hereafter be chartered or incorporated * * * not to exceed $100,000,000," as follows:

> "The State did not restrict the County to a single subscription. The language is: 'Any county in this State may subscribe to the stock of any railroad in this State, * * * and may issue bonds for the amount, etc., provided that the amount of *such subscription* shall not exceed $100,000.' That is, the power to subscribe is general, but no subscription shall exceed $100,000. The meaning might have been more distinctly expressed by using the plural, 'any railroads,' and making the proviso to read, 'the amount of such subscription shall not exceed $100,000 to any one railroad'; but

the same sense is sufficiently indicated by the words actually employed. *The power given is a power to subscribe to any railroad. This includes all railroads* in the State, *without restriction.* * * * The law simply meant to give the county full liberty on the subject, limiting only the amount of a single subscription. That the limitation contained in the proviso has reference to a single subscription only is apparent from a bare reading of the context. Omitting surplus words, the section reads thus: 'Any county in this State may subscribe to the stock of any railroad in this State, and issue bonds therefor: *Provided,* That the amount of *such subscription* (that is the subscription to any railroad) shall not exceed $100,000.' Here the words: *any railroad,* are used *distributively,* including *all railroads* taken severally; and the limitation has reference to the subscription to any railroad, that is to any one railroad taken separately. *Had the Legislature desired to limit the power of subscription to* $100,000, *the natural and appropriate mode of doing so would have been either to limit the County to one subscription not to exceed* $100,000, *or to provide that the amount of its subscription should not in the aggregate exceed* $100,000. *Neither of these things was done.* As the law stands, it confers a general power to subscribe to the stock of any rail-

road in the State for any amount not exceeding $100,000.

This construction of the statute disposes of the case." (Italics supplied.)

The meaning of the word "any," used similarly, is learnedly discussed by the Civil Court of Appeals of Texas, in the case of *McCuiston v. Fenet*, 144 S. W., 1155, and by the Supreme Court of Michigan in *Hopkins v. Sanders*, reported in 137 N. W., at page 709. In the latter case, the court, in construing the words "before *any suit* at law or in chancery shall be commenced in *any circuit court*," and "before the entry of *any final judgment*," said:

> "In broad language it covers 'any final decree' in 'any suit at law or in chancery' in 'any circuit court.' 'Any' means 'every,' 'each one of all,' and, by its general significance, in this connection includes the circuit court for the County of Wayne."

The city council in using the words, "every vessel carrying a cargo of explosives *in any form*," in paragraph 11 of Section 38 of the ordinance, intended the word "any" to mean all and every kind of explosives that were permitted in commerce. To deny to those words this meaning would be to defeat the intent of the legislative body. The law does not tolerate a construction which defeats the apparent will and intent of the legislative body. From these observations we have seen that the constitution, the legislature and the people of Seattle

have authorized the permitting of vessels containing cargo or part cargo of explosives to be anchored at Buoy No. 1 in Seattle harbor, and have vested in the port warden, the executive officer of the harbor department, the discretion as to the length of time that any such vessel so laden may lie at anchor or at a buoy in Seattle harbor. Therefore, in view of the provisions of Section 8311, Rem. & Bal. Code, viz:

> "NOTHING WHICH IS DONE OR MAINTAINED UNDER THE EXPRESS AUTHORITY OF A STATUTE CAN BE DEEMED A NUISANCE."

it cannot be said that the City of Seattle, by permitting a vessel loaded with explosives, recognized by the United States as articles of commerce, to be moored to a buoy, awaiting a ship to carry such explosives to their destination, under the express authority of paragraph 11 of Art. XI of the constitution of Washington, and Sec. 7507 of Rem. & Bal. Washington Code, was maintaining a nuisance. While Sec. 8308, Rem. & Bal. Washington Code, enumerates public nuisances, and Sec. 8309 defines what is a nuisance, we challenge counsel under the testimony and record in this case to point out what act or acts of the port warden constituted a nuisance in view of the provisions of Sec. 8311 of said code.

The defendant in error offered in evidence the fire patrol ordinance of the City of Seattle, over the objection of plaintiff in error. The harbor

ordinance, No. 34379, passed long after this fire patrol ordinance, which is No. 28324, is complete in itself and covers fully the subject made relative to shipping in Seattle Harbor, as authorized by the legislature of the State of Washington. If there were any conflict in these ordinances the harbor ordinance would prevail. But there is no conflict. The harbor ordinance was intended to cover the harbor and all activities therein. The fire patrol ordinance was intended to minimize fire hazards and control the handling of explosives on land within the limits of the city, other than at the powder dock. This is clear from the language of the sections of that ordinance in this record. Section 24 provides that all explosives must be removed beyond the city limits at night, "provided that this provision shall not apply to the master or other person in charge of any steamboat or vessel transporting any such explosives." Record, p. 59. Section 26 requires every master or other person in charge of any steamboat, vessel or other water craft, having on board any explosives, to immediately upon arrival notify the harbor master in writing of the amount of such explosives on board and obtain from the harbor master a permit *to land* such explosive substances, which permit shall specify the *dock* or *wharf* where such explosive substances may be *landed*, and the time when the same shall be *unloaded*. Record, p. 60. All such explosive substances shall be discharged, *landed* or unloaded under the supervision of the chief of the fire de-

partment and shall be immediately transported to some point without the limits of the city. Nothing could be clearer than that this ordinance No. 28324 was intended purely and solely to cover and control the landing, handling and sale of explosives on the land. If this were not true why did it except from its provisions "any ship or vessel in the harbor having on board explosives?" Clearly the City of Seattle was not maintaining a nuisance by permitting a vessel with a cargo of nitro-glycerin destined for a foreign port to be anchored in Seattle harbor?

Especially is this true when by paragraph 4 of Sec. 38 of ordinance No. 34379, it is provided that the only places in the city where explosives may be kept or stored are on the powder dock and on *powder boats within Seattle harbor.*

The case of "The Ingrid," reported in 195 Fed. Rep. at page 596, is on all fours with the instant case. There, there was an explosion by dynamite that had been held on a *pier* for a week awaiting shipment foreign. It exploded, breaking large quantities of glass, causing great loss of life and the destruction of the vessel "The Ingrid." An action was brought by the owner and captain of "The Ingrid" to recover damages caused by this explosion. It was charged in that case that the place where the dynamite was delivered for transportation was an improper place, and that the railroad company transporting the explosives had violated the law of New Jersey and the ordinance of Jersey

City in respect to the storage of explosives. Holt, District Judge, in disposing of these questions, said:

> "It is claimed that the pier was an improper place on which to deliver such a quantity of dynamite. But this claim seems to me untenable. Pier 7 was the pier farthest south in the Railroad Company's yards. It was as far removed from the other property in the yard as the car could be placed. It is claimed that railroad companies should be required to obtain a pier in an isolated part of the shore of the harbor. Aside from the physical difficulty and practical impossibility of all the great railroad lines which come into New York obtaining such piers, it is sufficient to say that the state of New Jersey has not passed any law requiring it, and, in the absence of such a law, I do not think that the railroad company in this case should be held liable to any such extreme precaution. * * * If it were to be held that any one who makes use of such instrumentalities as steam, gas, gasoline, gunpowder, and dynamite is an absolute insurer against any injury resulting from their explosion, irrespective of any question of negligences, it would largely restrict the use of such agencies. I think that the dynamite exploded on Pier 7 was in course of transportation by the Railroad Company, that there was no negligence by the Railroad Company either

in permitting the car to stand at the end of the pier as long as it did, or in any other respect. * * *

"The libelant claims that the Railroad Company violated the law of New Jersey, and the ordinances of Jersey City, in respect to the storage of explosives. In the first place, in my opinion, the liability of the Railroad Company, while transporting this dynamite, was governed exclusively by the act of Congress of March 4, 1909, which provides that the Interstate Commerce Commission shall formulate regulations for the safe transportation of explosives which shall be binding on all common carriers engaged in interstate or foreign commerce which transport explosives by land. Under this act, the Interstate Commerce Commission has formulated and issued regulations for the transportation of explosives, and it is not claimed that those regulations have not been complied with by the defendants. Congress having passed such a law, it clearly governs in my opinion all common carriers who come within its provisions, and takes the place of all local laws and ordinances on the subject. *Southern Ry Co. v. United States*, 222 U. S. 20, 32 Sup. Ct. 2, 56 L. Ed. ——; *Northern Pacific Ry. Co. v. State of Washington*, 222 U. S. 370, 32 Sup. Ct. 160, 56 L. Ed. ——; *Southern Ry. Co. v. Reid*, 222 U. S. 424, Sup. Ct. 140, 56 L. Ed. 424. If it did not, a railway company

transporting dynamite over a long railroad system, passing in the trip through various villages, cities, and states, would be subject at every stage of the journey to varying local regulations which probably it could not observe. It is pre-eminently just that in such cases there should be a central authority, prescribing what the Railroad Company, in the transportation of such explosives, should do. The fact that the bill of lading only described the shipment as being from Kenvil to Communipaw, within the state of New Jersey, did not change the fact that as to the 300 cases addressed to Carlisle, Crocker & Co., Montevideo, it was a foreign shipment. *Gulf, etc. R. R. Co. v. Fort Grain Co.* (Tex. Civ. App.) 72 S. W. 419.

Even if there were no act of Congress in existence, I think that there is nothing in the statutes of New Jersey or the ordinances of Jersey City which applies to this case. Those statutes and ordinances all apply, in my opinion, to the case of persons manufacturing explosives or storing and keeping them permanently in cities or dangerous places. There are expressions in these statutes and ordinances prohibiting any one from 'having or keeping' explosives except under certain restrictions, but it is apparent from the context that those expressions refer to having or keeping explosives on permanent storage, or for

sale, or while manufacturing them. They do not apply in my opinion to a railroad company transporting them from one place to another."

Judgment was entered dismissing the action against the respondents. This case was appealed to the Circuit Court of Appeals for the Second Circuit, and this court in disposing of the case, speaking through Rodgers, Circuit Judge, 216 Fed. Rep., page 78, said:

"The general and fundamental rule is that, the damage complained of must come from a wrongful act. In Addison on Torts, vol. 1, p. 3, the law is stated as follows:

'A man may, however, sustain grievous damage at the hands of another, and yet if it be the result of inevitable accident, or a lawful act, done in a lawful manner without any carelessness or negligence, there is no legal injury and no tort giving rise to an action for damages.'

"We are unable to discover that either the railroad company or the powder company or the contractor Healing, or any of the employes of either, committed any wrongful act which caused this explosion.

At the time of the explosion the dynamite was in the course of transportation. * * * We think there can be no doubt, so far as a common carrier is concerned, that such danger as necessarily results to others from the per-

formance of its duty, without negligence, must be borne by them as an unavoidable incident of the lawful performance of legitimate business. * * *

"It certainly would be an extraordinary doctrine for courts of justice to promulgate to say that a common carrier is under legal obligation to transport dynamite and is an insurer against any damage which may result in the course of transportation, even though it has been guilty of no negligence which occasioned the explosion which caused the injury. It is impossible to find any adequate reason for such a principle.

But it was urged upon us in the argument that the facts in the case clearly establish the existence of a nuisance. Car 91,442 had been forwarded on January 24th, and on January 25th the powder company received notice of its arrival. The next day the powder company removed 200 cases from the car, and placed them on a storage barge which belonged to it, and anchored it down the bay, in accordance with a practice it had followed for ten years. Nothing was done on January 27th to unload the balance of the car. On January 28th there were 170 cases more removed from the car for an export shipment. The remaining 300 cases were to be placed on board a steamer which it had been expected would sail on January 25th, but which was delayed in its sail-

ing. Under the established rules, the explosives could not be placed on board the steamer until her other cargo had been loaded. Then the explosives had to be taken to her on a lighter and put on board at Gravesend Bay. As soon as the steamer was ready to receive the cargo, the unloading of the dynamite remaining in the car commenced. * * *

"We are asked to hold the respondents responsible for the damages upon the theory that, even though they were not guilty of negligence, they were guilty of a nuisance in keeping on pier 7 the dynamite which caused the damage. * * *

"This pier 7 was used for the shipment of explosives, and the testimony shows that the locality was a suitable one for the purpose. We cannot think that under the circumstances it was an improper place on which to deliver dynamite. * * *

"Then it has been urged upon us that, as the 300 cases of dynamite were allowed to remain in the car for six days, they are to be regarded as having been practically in storage, and that pier 7 was an improper place in which to store so large an amount of explosives. But where should they have been removed to? There was no place in Jersey City for the purpose. And we agree with the court below in its opinion that the dynamite was not being held in storage but was still in course of transporta-

tion. * * * This dynamite was to be transferred to the Invernic for transportation to Montevideo. The original intention was that the vessel would sail on January 25th but her departure had been delayed from day to day for reasons not connected with the respondents. Until her cargo was loaded and she was ready to sail, the dynamite could not be placed on board because of the government regulations making it necessary to load the explosives at Gravesend Bay. Under all the circumstances, neither the railroad company nor the powder company nor the respondent Healing was at fault in permitting the dynamite to remain in the car for the six days which elapsed between the arrival of the car and its unloading.

"It is claimed that the respondent failed to comply with the requirements of the laws of the state of New Jersey and with the municipal regulations of Jersey City in respect to the storage of explosives. It is sufficient to say that the dynamite which exploded was addressed to Carlisle, Crocker & Co., Montevideo. It was a foreign shipment and as such was subject exclusively to the act of Congress approved March 4, 1910 (35 Stat. 1136, c. 321 (U. S. Comp. St. Supp. 1911, p. 1660)). That act (section 233) authorized the Interstate Commerce Commission to formulate regulations for the safe transportation of explosives

which should be binding upon all common carriers engaged in interstate or foreign commerce which transport explosives by land. The Interstate Commerce Commission accordingly formulated and issued regulations governing the transportation of explosives in interstate and foreign commerce. We have no doubt that the dynamite in question was subject exclusively to the regulations of the Interstate Commerce Commission. When Congress has legislated upon a subject within its constitutional control, and has manifested its intention to deal therewith in full, the authority of local jurisdiction is necessarily excluded. See *Northern Pacific Railway Co. v. State of Washington*, 222 U. S. 370, 378, 32 Sup. Ct. 160, 56 L. Ed. 237."

In the instant case Buoy No. 1 was situated in Elliott Bay, located away from traffic, isolated from the hazard of fire and the element of human carelessness. It was a place safe, in the estimation of those familiar with the characteristics of high explosives to anchor this scow of nitro-glycerin. Exercising the discretion vested in the port warden, by the ordinance regulating ships carrying explosives in Seattle Harbor, his judgment was that this was a safe place for the anchorage of this scow. Record, pp. 43 to 48. The port warden testified that the City of Seattle had nothing to do with the scow or its contents, that it exercised no authority or control over it, that the city never had this ex-

plosive "in storage of any kind, shape or description." It merely permitted the scow to be moored at Buoy No. 1, a buoy established for that purpose. Record, p. 48.

Captain James S. Gibson, manager of the International Stevedoring Company, with twelve years experience as shipping master and twenty-one years experience as manager of stevedoring, testified:

> Q. Now, Captain Gibson, from your experience as a shipping man in the handling of high explosives as the manager of this stevedoring concern, concerning the handling of dynamite of this character, would you say that Buoy No. 1 was a safe place?
>
> A. Absolutely.

He further testified that it was the custom in 1915 in Seattle Harbor in transferring dynamite from vessels coastwise to vessels foreign to take it alongside away from the dock, either at buoys or at anchor in the harbor. Record, p. 66.

G. H. Adair, an explosive expert with twenty-four years practical experience, testified that he was familiar with the characteristics of the kind of explosives on the scow moored to Buoy No. 1; that he did not know of any safer place in Seattle Harbor than said buoy for the anchorage of vessels containing such explosives; that the Harrison Street dock was known as the powder dock and was used only for distributing small shipments that were necessary to be brought to the limits of Seattle for

consumption or for transfer to railroads; that there was no place in Seattle to store dynamite; that no foreign shipments handled by him were handled at the Harrison Street dock; that he would not even have considered mooring this dynamite to that dock. Record, p. 68.

John H. Wilman, who had been engaged in the manufacture, and, with the DuPont Powder Company, in the handling of this kind of explosive for twenty-eight years, testified that he was familiar with the kind of explosive on the scow; that it was very powerful and less sensitive than the ordinary dynamite of commerce; that the things to be guarded against in handling such explosives were fire and isolation from traffic; that there was no place in Seattle to store such quantities of dynamite as was on the scow; that to explode this kind of dynamite required fire and vibration. He was asked the following question:

> "If you, Mr. Wilman, were asked—having the knowledge of these explosives and the experience you have had with them—to fix a place in the Bay for the mooring of vessels containing a high explosive of this kind and for their transfer, would you select Buoy No. 1 as a safe place?"

to which he answered:

> "I would consider it such."
>
> "Q. Now, with your experience, would you consider for a moment the anchoring or tying up to a wharf in the city of Seattle the

quantity of dynamite that was on that scow—of the kind that was on it?

A. I would not consider it safe and particularly at that time." Record, pp. 71, 72.

W. C. Dawson, who, as a steamship agent and operator, had handled high explosives for twenty years, and whose company, for the last ten years, had carried high explosives via San Francisco and Puget Sound continuously, testified that he was familiar with the location of Buoy No. 1 and the Harrison Street powder dock. He further testified:

"Q. What would you say as to the safety of Buoy No. 1 for the transferring of explosives such as are in issue here and as to the anchorage of boats or vessels carrying that explosive at that buoy?

A. I consider it a very proper and safe place for the exchange of explosives from one vessel to another.

Q. And to anchor boats?

A. Yes, sir." Record, pp. 79, 80.

He further testified that he handled at the Harrison Street dock, only small shipments that were used locally—distributions that had no other terminals. Foreign shipments were transferred to another vessel or to a scow or barge if the connecting vessel was not here. This was done in Elliott Bay altogether in 1915.

While the municipality was not a party in the suit of "The Ingrid," the principle of non-liability

is the same. The United States Circuit Court of Appeals for the Fourth Circuit, in the case of *Foard Co. v. State of Maryland*, 219 Fed. Rep. 827, said:

> "Loading dynamite, gasoline, gunpowder, naphtha, and other inflammable or explosive substances is necessary to commerce and is not a nuisance. The Ingrid (D. C.) 195 Fed. 596, and authorities cited; *Ingrid v. Central Railroad Co.* (2d Circuit), 216 Fed. 72, 132 C. C. A. 316. * * *
>
> "Assertion of liability of the city of Baltimore is made on the ground that it was negligent in designating the place where the accident occurred for the transhipment of dynamite, in that it was a place frequented by other vessels, and that it was negligent in not properly supervising the loading of dynamite where an explosion would probably result in loss of life and property. This position is untenable. The general rule is that actionable negligence cannot be imputed to a city for mistake of judgment, or even negligence, of its officers in performing the governmental function of selecting a place for the loading of explosives from which it derives no profit. *Boehm v. Baltimore*, 61 Md. 265; *Lane v. City of Concord*, 70 N. H. 485, 49 Atl. 687, 85 Am. St. Rep. 643; *Hagerstown v. Klotz*, 93 Md. 437, 49 Atl. 836, 54 L. R. A. 940, 86 Am. St. Rep. 437; Note, *Van Cleef v. Chicago*, 23 L. R. A. (N. S.) 636; *Rogers v. City of Binghampton*, 186 N. Y.

595, 79 N. E. 1115; *City of Mansfield v. Bristor*, 76 Ohio St. 270, 81 N. E. 631, 10 L. R. A. (N. S.) 806, 118 Am. St. Rep. 852, 10 Ann. Cas. 767; *Salmon v. Kansas City*, 241 Mo. 14, 145 S. W. 16.

"Dynamite being a necessity and its transportation lawful, the community must bear such risk of damage from its transportation as cannot be avoided by due care. It is at least doubtful if any degree of care would result in finding an anchorage in the harbor, reasonably accessible, where the explosion of a cargo of dynamite would not be destructive. Remoteness from habitations and business houses, smoothness of water, freedom from fogs, ease of transfer from car to ship, must all be considered, and due care and sound judgment exercised. The conclusion of the District Court is well supported that under the facts before it the city chose wisely, or at all events that the choice was made by a competent official, acting with due care and in good faith, and that the city incurred no liability.

" * * * As loading dynamite is not a nuisance, but is universally recognized as a legitimate business, and the Jason was in the designated anchorage grounds, it follows from the views already expressed that her owner is not liable to those who happened to be on the ship for not changing his anchorage, whenever it was discovered that another ship was loading dynamite."

From the record in the instant case there is but one conclusion, that is, that "under the facts before it the city chose wisely, or, at all events, that the choice was made by a competent official acting with due care and in good faith." In fact, this is not disputed. Therefore, the city incurred no liability.

IV.

THE COURT ERRED IN HOLDING AS A MATTER OF LAW THE CITY OF SEATTLE WAS LIABLE FOR THE ACT OF ITS OFFICER, THE PORT WARDEN, WHILE ENGAGED PURELY IN A GOVERNMENTAL FUNCTION.

The City of Seattle, while engaged in the regulating and controlling of the anchorage, moorage and landing of water craft, and their cargoes, in the harbor of the City of Seattle, through its port warden, was performing a purely governmental function and was not acting in a proprietary capacity. While the testimony shows that the City of Seattle, through its port warden, charged fees for the use of its buoys and piers, these fees were not such as to make a profit to the city. They were fees laid under the police power, and were purely regulatory. The testimony shows these buoys cost between Eleven and Twelve Thousand Dollars and that the income from Buoy No. 1 during the year 1915 averaged 51 cents a day and that the cost of its maintenance and upkeep was between $150 and $250 per year (Record, p. 48). Further the city

announced in its ordinance authorizing the regulation of the anchorage and moorage of vessels that it was acting purely within, and in aid of, its police power. The exercise of this power is never anything but governmental. It is never proprietary. The Supreme Court of the State of Washington, in passing upon this very ordinance, in the case of *The Kitsap County Transportation Company against the City of Seattle*, reported in 75 Wash. 673, at page 674, said:

> "The sole question here for determination is whether or not the city, in exercising control over the harbor and waters of Elliott Bay in front of the City of Seattle, is liable in damages for failure of the port warden to enforce an ordinance which provided for the keeping of the harbor free from debris. * * * But the ordinance imposes a penalty on all who may thus transgress its provisions, and places the duty upon the port warden of enforcing it. If, then, the city is liable in damages, it must be by reason of the negligence of the port warden in failing to enforce the ordinance. The general rule is that a city is not civilly liable for neglect of duty on the part of its officers in respect to the enforcement of ordinances. In 4 Dillon, Municipal Corporations (5th ed.), § 1627, it is said:
>
> 'Unless there be a valid contract creating, or a statute declaring, the liability, a municipal corporation *is not bound to secure a per-*

fect execution of its by-laws, relating to its public powers, and it is not responsible civilly for neglect of duty on the part of its officers in respect to their enforcement, although such neglect results in injuries to private persons which would otherwise not have happened.'

In the present case, the negligence, if any, being that of the port warden in failing to exercise proper diligence in the enforcement of the ordinance, would not render the city liable to respond in damages."

The question of the liability of a city for acts of its officers acting in a governmental capacity, has many times been before the Supreme Court of Washington, and the rule, that a municipal corporation engaged in the performance of a public service, in which it has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants of the community, the officers act as public officers of the city, charged with a public service and for whose negligence or misconduct in the discharge of their official duty, no action will lie against the city unless expressly given, has been announced, and uniformly adhered to.

Lynch v. North Yakima, 37 Wash. 657.
Cunningham v. Seattle, 42 Wash. 134.
Russell v. Tacoma, 8 Wash. 156.
Howard v. Tacoma School District No. 10, 88 Wash. 167.

See *Foard v. Maryland*, 219 Fed. 827.

Generally, the courts of the United States will follow the construction placed upon the statutes of a state by the courts of last resort of such state.

Emerson-Brant Improvement Company v. Lawson, 237 Fed. 877.

We are not alone depending upon the construction placed upon the ordinance here in issue by the court of last resort in the State of Washington, for in *Foard v. Maryland*, 219 Fed. 827, at page 834, the Circuit Court of Appeals of the Fourth Circuit, announces and approves the same doctrine. At page 834 the court said:

> "Assertion of liability of the city of Baltimore is made on the ground that it was negligent in designating the place where the accident occurred for the transhipment of dynamite, in that it was a place frequented by other vessels, and that it was negligent in not properly supervising the loading of dynamite where an explosion would probably result in loss of life and property. This position is untenable. The general rule is that actionable negligence cannot be imputed to a city for mistake of judgment, or even negligence, of its officers in *performing the governmental function of selecting a place* for the loading of explosives from which it derives no profit." (Italics supplied.)

The same contention that was made in the

Foard case is made here, viz., that the port warden by designating Buoy No. 1, the place where the accident occurred, for the transhipment of dynamite, was negligent and created a nuisance. This contention is untenable. True, for the use of the buoy the port warden received $1.00 per day but for designating it as a place for this scow to moor he received absolutely nothing. The port warden was simply exercising his discretion and judgment in selecting this place as a safe place for this scow to be while awaiting a vessel to carry its contents to its destination. This act was purely governmental in its nature.

That a municipal corporation is not liable for damages in the nonfeasance or omission to observe a law of its own, is well stated by Chief Justice Marshall in the case of *Fowle v. Common Council of Alexandria*, 3 Pet. 398, 7 L. Ed., 719, at page 723:

> "Is a municipal corporation, established for the general purposes of government with limited legislative powers, liable for losses consequent on its having misconstrued the extent of its powers in granting a license which it had not authority to grant without taking that security for the conduct of the person obtaining the license which its own ordinances had been supposed to require, and which might protect those who transacted business with the person acting under the license? We find no case in which this principle has been affirmed.

That corporations are bound by their contracts is admitted; that money corporations, or those carrying on business for themselves, are liable for torts, is well settled; but that a legislative corporation, established as a part of the government of the country is liable for losses sustained by a nonfeasance, by an omission of the corporate body to observe a law of its own in which no penalty is provided, is a principle for which we can find no precedent. We are not prepared to make one in this case."

V.

THE COURT ERRED IN HOLDING AS A MATTER OF LAW THE CITY OF SEATTLE LIABLE FOR THE RESULTS OF AN EXPLOSION OF NITRO-GLYCERIN ANCHORED IN SEATTLE HARBOR AND OVER WHICH NITRO-GLYCERIN THE CITY COULD NOT AND DID NOT EXERCISE ANY CONTROL OR JURISDICTION, IT BEING IN TRANSIT IN FOREIGN COMMERCE.

It is undisputed that this dynamite that exploded on the 30th day of May, 1915, was in foreign commerce. It was shipped from San Francisco to Vladivostok, Russia, to be transferred from the coastwise vessel bringing it to Seattle to some ship sailing for Vladivostok. For some reason utterly beyond the control of the City of Seattle the Maru on which it was to have been taken did not take

it. It then became necessary for it to remain in Seattle harbor until a vessel carrying powder and sailing for Vladivostok arrived. The City of Seattle could not control the steamships engaged in foreign commerce. It had no power to require any ship or ships, or their masters, to take this dynamite. It had no power to prohibit the shipping of dynamite from San Francisco by way of Seattle, to Vladivostok. This dynamite, while awaiting a vessel to carry it to its destination, must remain somewhere. The agents of the owners of this dynamite applied to the port warden for a place in Seattle harbor where it might be moored pending the arrival of a vessel for its shipment. He designated a buoy farthest from the railroads, piers, streets, habitations, and away from the danger of fire and the element of human carelessness. Record, pp. 46, 47, 48. In selecting this place he exercised his best judgment, a judgment confirmed by the witnesses, Captain J. S. Gibson, G. H. Adair, W. H. Wilman and W. C. Dawson, all men having a quarter of century experience in the handling of high explosives. But counsel for defendant in error say that the city council fixed by ordinance the Harrison Street powder dock as the only place where vessels carrying dynamite could be moored. We have discussed this contention under point II and invite the consideration of the discussion under that point in answer to that contention. By Sections 4278 R. S. and 4279 R. S. the Congress of the United States has assumed

control and regulation of the transportation of explosives, both in interstate and foreign commerce. Having evinced its intention to control this particular commodity in commerce the jurisdiction of it is at once taken away from the states and their political subdivisions.

Southern Ry. Co. v. U. S., 222 U. S. 20; 32 Sup. Ct. 2, 56 L. Ed. 72.

Northern Pacific Ry. Co. v. State of Washtion, 222 U. S. 370; 32 Sup. Ct. 160, 56 L Ed. 237.

Southern Ry. Co. v. Reid, 222 U. S. 424; 32 Sup. Ct. 140, 56 L. Ed. (U. S.) 1079.

The only power or authority over explosives in commerce granted to the states or their political subdivisions is given by Section 4280 R. S. This latter section provides:

> "The two preceding sections (4278, 4279) shall not be so construed as to prevent any * * city * * within the United States from regulating or from prohibiting the traffic in or transportation of those substances, between persons or places lying or being within their respective territorial limits, or from prohibiting the introduction thereof into such limits, for sale, use, or consumption therein."

No power is, by this section, reserved to the city to say to the owner or the master of a vessel engaged in foreign or interstate commerce, having cargo of explosives,—"You shall not enter the har-

bor of Seattle with your ship and cargo." Nor is the power reserved to refuse the right to anchor in Elliott Bay. No power is reserved to prohibit the introduction of explosives into the limits of the city except for sale, use or consumption therein. No power is reserved to prevent the introduction of explosives into the limits of the city in interstate or foreign commerce. To sustain the contention that the city had such powers would be to overrule the decisions of the Supreme Court of the United States beginning with *Gibbon v. Ogden*, 9 Wheat. 67, to the present time, as well as to repeal many acts of Congress. The mere statement of the situation furnishes an answer to any such contention. The only power reserved to cities by Congress is the power to regulate or prohibit the movement of explosives from person to person or place to place, and their sale, use and consumption therein, after they have been commingled with the property of the state and have ceased their character as articles of interstate or foreign commerce.

VI.

THE COURT ERRED IN DENYING PLAINTIFF'S MOTION TO DISMISS.

Without repeating, the arguments preceding this point are apposite, and, in considering this point, we ask the court to consider the arguments heretofore made as though repeated.

In conclusion we submit that the demurrer of the plaintiff in error should have been sustained

by the court. In any event, upon the record in the case, the motion of the City of Seattle to dismiss the action should have been granted by the lower court. The judgment should be reversed, and the action dismissed.

Respectfully submitted,

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